IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CLOVER HEALTH INVESTMENTS, CORP. f/k/a SOCIAL CAPITAL HEDOSOPHIA HOLDINGS CORP. III,	)	
Plaintiff,	)	
v.	)	
BERKLEY INSURANCE COMPANY, XL SPECIALTY INSURANCE COMPANY, ALLIED WORLD SPECIALTY INSURANCE COMPANY, ENDURANCE RISK SOLUTIONS ASSURANCE CO., and HUDSON INSURANCE COMPANY,	)	C.A. No. N22C-06-004 MMJ CCLD
Defendants.	)	

Submitted: February 27, 2023
Decided: March 9, 2023

On Defendant's Application for Certification of Interlocutory Appeal
DENIED

Jennifer C. Wasson, Esq., Carla M. Jones, Esq., Potter Anderson & Corroon LLP, Wilmington, DE, Robin L. Cohen, Esq. (*pro hac vice*), Kenneth H. Frenchman, Esq. (*pro hac vice*), Cynthia M. Jordano, Esq. (*pro hac vice*), Cohen Ziffer Frenchman & McKenna LLP, New York, NY, *Attorneys for Plaintiff*

Bruce W. McCullough, Esq., Bodell Bové, LLC, Wilmington, DE, David F. Cutter, Esq. (*pro hac vice*), Jonathan R. Walton, Esq. (*pro hac vice*), BatesCarey LLP, Chicago, IL, Courtney E. Scott, Esq. (*pro hac vice*), Tressler LLP, New York, NY, *Attorneys for Defendants*

JOHNSTON, J.

ORDER DENYING INTERLOCUTORY APPEAL

(1) Defendants Endurance Risk Solutions Assurance Company and Hudson Insurance Company ("Tail Insurers") have moved for an order certifying an interlocutory appeal to the Delaware Supreme Court. The determination of whether to certify an interlocutory appeal lies within the discretion of the Court and is analyzed under the criteria set forth in Supreme Court Rule 42(b). Rule 42(b)(i) states: "No interlocutory appeal will be certified by the trial court or accepted by this Court unless the order of the trial court decides a substantial issue of material importance that merits appellate review before final judgment." Rule 42(b)(ii) admonishes: "Interlocutory appeals should be exceptional, not routine, because they disrupt the normal procession of litigation, cause delay, and can threaten to exhaust scarce party and judicial resources. Therefore, parties should only ask for the right to seek interlocutory review if they believe in good faith that there are substantial benefits that will outweigh the certain costs that accompany an interlocutory appeal."

(2) Assuming that the gating requirement of Rule 42(b)(i) has been satisfied, an application also must meet one or more of the eight factors set forth in Rule 42(b)(iii). Rule 42(b)(iii) counsels: "After considering these factors and its own assessment of the most efficient and just schedule to resolve the case, the trial court

should identify whether and why the likely benefits of interlocutory review outweigh the probable costs, such that interlocutory review is in the interests of justice. If the balance is uncertain, the trial court should refuse to certify the interlocutory appeal."

(3) In this action, the Court issued an Opinion dated February 6, 2023, holding that: (1) the plain language of the Insured Persons definition in the Primary Tail Policy included six directors and officers; (2) the definition of "Claim" is ambiguous as it pertains to the SEC Investigation where the SEC issued subpoenas to Clover Health; and (3) the larger settlement rule applies to defense costs for the underlying securities and derivative actions.

(4) Tail Insurers argue the Court's Opinion decided substantial issues of material importance under Rule 42(b)(i). Tail Insurers contend the Court's Opinion satisfies the criteria of Rule 42(b)(iii) because: (1) the Opinion allegedly involved questions of law decided for the first time in Delaware; (2) immediate review of the Court's Opinion may terminate the litigation as to the Tail Insurers; and (3) review of the Opinion will serve the interests of justice. Tail Insurers also argue the benefits of interlocutory appeal outweigh the costs.

(5) Plaintiff argues the Court's Opinion did not decide substantial issues of material importance under Supreme Court Rule 42(b)(i), and that the Court's Opinion did not satisfy the criteria of Supreme Court Rule 42(b)(iii) because: (1) a

Court's interpretation of "clear and unambiguous" contractual terms "does not implicate any of the criteria in Rule 42(b)(iii) to warrant interlocutory appeal;"[1] (2) an interlocutory appeal will not terminate this litigation; and (3) interlocutory review will not serve the interests of justice. Plaintiffs also argue the benefits of interlocutory appeal do not outweigh the costs.

(6) The Court finds its Opinion dated February 6, 2023 determined substantial issues of material importance under Supreme Court Rule 42(b)(i) by determining that: (1) the plain language of the Insured Persons definition in the Primary Tail Policy included six directors and officers; (2) the definition of "Claim" is ambiguous as it pertains to the SEC Investigation where the SEC issued subpoenas to Clover Health; and (3) the larger settlement rule applies to defense costs for the underlying securities and derivative actions.

(7) However, the Court finds the Supreme Court Rule 42(b)(iii) factors do not weigh in favor of certifying this interlocutory appeal. While the Court's Opinion states that "the question of who qualifies as Insured Persons under this type of insurance policy language is an issue of first impression for this Court," the Court "interpreted insurance policy provisions in a manner more akin to

[1] *REJV5 AWH Orlando, LLC v. AWH Orlando Member, LLC*, 2018 WL 1109650, at *3 (Del. Ch.), *appeal refused*, 182 A.3d 115 (Del. 2018); *see also Renco Grp., Inc. v. MacAndrews AMG Holdings LLC*, 2015 WL 1830476, at *2 n.3 (Del. Ch.) ("The Court's contract interpretation, even if wrong, would not seem to warrant interlocutory appeal.").

determining nuance than to deciding entirely novel issues."[2] This is also true with respect to the Court's interpretation of the "Claim" definition, stating that it was ambiguous. Determining whether a definition is ambiguous is not a question of law determined for the first time by this Court. Rather, it was the Court's interpretation of the contract language. Regarding the Larger Settlement Rule, the Court relied upon *Arch Ins. Co. v. Murdock*,[3] which gave a thorough analysis of the Larger Settlement Rule.[4] This case also contemplated the Larger Settlement Rule's application to defense costs.[5] Therefore, this was not an issue of first impression.

(8) Review of this interlocutory order would not terminate this litigation. Even if Tail Insurers were to succeed in an interlocutory appeal, the Court's Opinion dated February 6, 2023 did not resolve all outstanding issues. Discovery would continue with respect to the Tail Insurers' allocation disputes. And with respect to the other Defendant Insurers involved in the case, interlocutory review would not terminate their litigation.

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[2] *Guaranteed Rate, Inc. v. ACE Am. Ins. Co.*, 2021 WL 5370794, at *2 (Del. Super.); *see also REJV5 AWH Orlando*, 2018 WL 1109650, at *3 (explaining that when a court is "simply interpreting what it viewed as clear and unambiguous terms of . . . [an agreement, it] . . . does not implicate any of the criteria in Rule 42(b)(iii) to warrant interlocutory appeal").

[3] 2020 WL 1865752 (Del. Super.), *aff'd*, *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 890 (Del. 2021).

[4] *Id.* at *5–9.

[5] *Id.* at *7 ("The Larger Settlement Rule provides that 'allocation is appropriate only if, and only to the extent that, the defense or settlement costs of the litigation were, by virtue of the wrongful acts of the uninsured parties, higher than they would have been had only the insured parties been defended or settled.'" (quoting *Safeway Stores, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 64 F.3d 1282, 1287 (9th Cir. 1995))).

(9) Therefore, the Court finds that the likely benefits of interlocutory review do not outweigh the inefficiency, disruption, and probable costs. Thus, interlocutory review will not serve the interests of justice.

Therefore, Tail Insurers have failed to demonstrate that any of the eight criteria set forth in Delaware Supreme Court Rule 42(b)(iii) require that the Court exercise its discretion to certify interlocutory appeal. The Application for Certification of an Interlocutory Appeal is hereby **DENIED**.

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston